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In the

# Supreme Court of the United States

October Term, 1948

38

No. 38

LA CROSSE TELEPHONE CORPORATION,
*Appellant,*

*v.*

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

39

No. 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. of L.,
*Appellant,*

*v.*

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

# Brief of Wisconsin Employment Relations Board

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# Brief of Wisconsin Employment Relations Board

## OPINIONS BELOW

The opinion of the Wisconsin Supreme Court from which appeal is taken is reported in 251 Wis. 583, 30 N. W. 241.

The Wisconsin Supreme Court reversed a judgment of the Circuit Court for La Crosse County which had set

aside and reversed a certification by the Wisconsin Employment Relations Board of an election conducted by it to ascertain the desires of certain employees with respect to a bargaining representative. The judgment of the Circuit Court, 12 C. H. H. Labor Cases par. 63,795, appears at pages 11 to 12 of the record.

The certification of the Wisconsin Employment Relations Board is unreported, but appears at pages 12 to 15 of the record.

The effect of the action of the Supreme Court of Wisconsin in reversing the judgment of the La Crosse County Circuit Court resulted in the entry of a judgment merely dismissing the petition for review of the state board's certification. It does not provide for the entry of any affirmative judgment which is enforcible by process of the court or otherwise.

## STATEMENT RESPECTING GROUNDS ON WHICH JURISDICTION IS INVOKED

The appellants seek to invoke the jurisdiction of this court under sec. 237 (a) of the Judicial Code, 28 U. S. C. A. sec. 344.

The appellee has heretofore submitted a statement opposing jurisdiction, and on April 19, 1948 this court took the following action:

> "The statements of jurisdiction in these cases having been submitted and considered by the court, further consideration of the question of jurisdiction of this court is postponed to the hearing of the cases on the merits."

The jurisdictional question is accordingly included within the issues upon which argument is submitted in this brief.

## QUESTIONS PRESENTED

1. Is a judgment of a state court, dismissing a petition for review of a certification of the results of an election conducted by a state agency to determine the wishes of employees of a local telephone company as to a bargaining representative, reviewable under section 237 (a) of the Judicial Code, when such certification imposes no enforcible obligation?

2. Did Congress, by the mere enactment of the National Labor Relations Act, preclude a state agency from conducting an election to ascertain the wishes of employees of a local telephone company with respect to a bargaining representative, when no enforcible order or judgment is entered on the basis of such election, and when the National Labor Relations Board has never taken jurisdiction of any phase of the labor relations between the employer and employees involved?[1]

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[1]The issue as stated on page 2 of the brief of the appellant, La Crosse Telephone Corporation merely repeats the question first posed to the Supreme Court of Wisconsin. The issue before this court is necessarily limited by the decision of the Wisconsin Court. The question was not answered by the Wisconsin court with an unqualified negative, but was based upon the circumstances that the National Labor Relations Board had never taken any jurisdiction whatever with respect to the company or its employees, and that the action of the state board did not contravene any policy of federal legislation.

## STATEMENT OF THE CASE

We believe there can be no dispute as to the facts recited by the Wisconsin Supreme Court, at 251 Wis. 586-589, 30 N. W. 2d 242-3. Some of the facts recited by the state supreme court are not necessary to a disposition of the narrower issues raised by this appeal, and so we will cull from the state court's decision only those facts which are pertinent here.

On October 8, 1946 the Telephone Guild of Wisconsin (hereinafter referred to as the Guild) petitioned the Wisconsin Employment Relations Board (hereinafter referred to as the state board) to conduct an election to determine the desires of employees of the La Crosse Telephone Corporation (hereinafter referred to as the company or the employer) as to their collective bargaining representative. Although no hearing is required on such a petition by state statute (since the conduct of such election has been designated by state courts as "fact-finding procedure * * * in merely a ministerial capacity") the state board did conduct a hearing as a part of its investigation with respect to the petition before it.

The company had been bargaining with the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. (hereinafter referred to as Local B-953) on behalf of employees in its plant and traffic departments (which included all excepting its office workers). The employer and Local B-953 had a contract expiring December 1, 1946 (R. 19-20, 23) with the provision that it should extend from year to year thereafter unless either party should give notice 90 days "prior to the annual expiration date requesting that the agreement be amended or cancelled"

(R. 36). Local B-953 had notified the employer on August 28, 1946 of a desire to amend the agreement under such provision (R. 22, 25).

Negotiations were undertaken between the company and employee committees for amendments, which resulted in acceptance of a modified proposal by the Local B-953 on the evening of September 25, 1946 (R. 27, 29-30). The employer was notified of such acceptance by letter dated September 27th (R. 22, 27, 30, 31).

In the meantime the Guild, which had received approximately 85 applications for membership among the company's employees (constituting substantially more than 50% of those eligible for membership) (R. 19) had petitioned the National Labor Relations Board (hereinafter referred to as the national board) for certification as bargaining representative of the employees represented previously by Local B-953. The employer was notified by letter dated September 24, 1946, from the national board's office in Minneapolis of the Guild's claim to represent the employees (R. 25).

On October 8, 1946 the Guild filed with the national board a request to withdraw the petition previously submitted (R. 18-19), and filed a petition for election with the Wisconsin board. As the Wisconsin Supreme Court stated:

> "There is nothing in the record * * * to indicate that the national board has ever in any manner exercised any of its powers or discretion or otherwise taken jurisdiction of any question or phase of the employers or its employees industrial relations" (R. 53).

The state board's only concern with the contract relation between the employer and Local B-953, was as it might affect the date when an election should be conducted. The board did not attempt to pass upon the rights and obligations of the parties under the contract, but considered the negotiations only as they might have a bearing upon whether the election should be postponed until a later date.

The state board then conducted an election on November 27, 1946, at which time the overwhelming majority of the employees in the unit previously represented by Local B-953 indicated a desire to have the Guild as their representative for future bargaining. There were 91 votes cast for the Guild, and 14 in favor of Local B-953 (R. 12-14).

The state board certified the results of the election on January 14, 1947, but issued no order. The employer and Local B-953 have continued to bargain in the same manner as they did prior to the election, disregarding the election and the expression of employees' wishes, and have together carried on litigation to contest the validity of the certification.

The Circuit Court for La Crosse County set aside the certification, but was reversed by the State Supreme Court. The judgment entered in the Circuit Court pursuant to the reversal merely dismissed the petitions for review of the board's certification.

No stay or supersedeas has been involved in the proceedings because there is nothing to stay. The certification contains no command and there is no penalty for disregarding it, as has been done in this case.

The nature of the company's operations is characterized by the Supreme Court of Wisconsin as follows:

"The Employer is a Wisconsin corporation and all its Employees are employed in La Crosse County in this state in its operation of a local telephone service within the La Crosse area, and rendering in connection therewith such intrastate and interstate long distance service as is incidental thereto."

The "incidental" long distance service above referred to entered the case solely by dint of judicial notice, because the record contained no evidence to that effect. The result seems entirely reasonable, however, and the respondent board is not disposed to quarrel with the decision of the State Supreme Court.

It has been urged in the brief of the appellant Local B-953 that the statement in the decision of the lower court whose judgment was reversed (to the effect that it is admitted that the La Crosse Telephone Corporation is "engaged in" interstate commerce) is controlling because it is a "finding." The only findings which are authorized to be made in these proceedings must be made by the board on the basis of evidence introduced before it. The courts sit in review only, and may neither hear nor consider evidence which was not before the board. Anything further which enters the courts' considerations beyond the board's findings would be on the basis of judicial notice.[2] The only agency authorized to make findings is the state board. It made no finding that the employer was "engaged in" interstate commerce; probably for the reason that there

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[2]Century Building Co. v. Wisconsin E. R. Board, (1940) 235 Wis. 376, 291 N. W. 305.
Wisconsin E. R. Board v. Allis-Chalmers W. Union, (1948) 252 Wis. 436, 31 N. W. 2d 772.
Wisconsin E. R. Board v. J. P. Cullen & Son, (1948) 253 Wis. 105, 33 N. W. 2d 182; 253 Wis. 109, 33 N. W. 2d 184.

was no evidence to that effect, since such issue was not raised in the hearing before the board.

The only evidence before the board which is urged as a basis for a finding with respect to interstate commerce is that the employer is a subsidiary of a corporation which has other subsidiaries, and that an Illinois company is operated from the "La Crosse Office." As to the first point, ownership of a company does not disclose the nature of its operations. As to the second, the operation of an Illinois company from a La Crosse office (presumably the office of the parent company) does not establish that operations of the La Crosse Telephone Company are other than local.

The evaluation of the record by the state Supreme Court supersedes that of the lower court. So far as the operations of the company are pertinent to the issues, therefore, the information in the records is summarized in the words of the state supreme court: That the employer is a Wisconsin corporation engaged in business wholly within the State of Wisconsin as a local public utility, with the usual long distance service incidental to a small local exchange.

## SUMMARY OF ARGUMENT

### I.

The action of the state board of which review is sought is not an order, but only the certification of the wishes of employees as expressed in an election conducted by the board. It is not enforcible and has no legal consequence unless further proceedings are instituted, hearing held, and order entered. In such case the further proceedings would not be enforcible until judicial review could be had.

The certification is not a final judgment within the meaning of sec. 237 (a) of the Judicial Code.

### II.

Congress, by limiting the application of the representation and unfair practices sections of the federal law to questions and practices "affecting" commerce and by its definition of "affecting commerce," has left to states the power to regulate such matters not actually arising *in* commerce until the national board makes the factual findings necessary to invoke the application of the federal act in individual cases. Congress contemplated state regulation in such cases, as this court recognized in *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 222-223, 83 L. ed. 126, 59 S. Ct. 206, where it was said that "in determining the factual question regard should be had to all existing circumstances including the bearing and effect of any protective action to the same end already taken under state authority."

The question of representation here involved did not arise *in* commerce. The National Labor Relations Board has never taken jurisdiction over any phase of the labor relations of the appellant employer or its employees.

There is not here involved any question of bargaining unit because that has been agreed upon by all parties, as federal legislation contemplates may be done.

The action of the state board involved the exercise of no discretion but merely made known a fact which would aid the process of collective bargaining. The action did not result in frustrating any policy of the federal law, but operated to aid in carrying out the objectives sought by federal legislation, by revealing that 91 out of 105 employees desired the Guild as their bargaining agent.

Wisconsin does not assert "joint" jurisdiction, but only subordinate jurisdiction to prevent disruptions inimical to internal welfare, until the federal agency is able to take over the situation. When that happens, the state courts recognize that the power of the federal agency is paramount.

The state law has been interpreted so that it may not be administered in a manner to frustrate objectives of applicable federal legislation, and is administered so as to avoid conflict. The state law as interpreted and administered seeks to accomplish the same objective of encouraging collective bargaining as is the purpose of the federal law.

Successful challenge of the state action would be to defeat the federal objective of assuring to employees the right to bargain through representatives of their own choosing.

III.

The re-enactment in the Labor-Management Relations Act, 1947, of the provisions of Title I which were the basis of the holding in the *Consolidated Edison Co. case* recognizing a field of state jurisdiction, operates as an approval of the plan of correlation of state and federal regulation there described.

The provisions of sec. 10 (a) providing for "ceding" jurisdiction entail a recognition that Congress did not intend to extinguish state power; else it could not constitutionally delegate to an administrative agency the power to recreate such power by administrative fiat.

The terminology used in sec. 10 (a) indicates that Congress recognized a field of state power in the absence of action by the National Labor Relations Board, and that cession was to be limited to cases in which the national board actually assumes jurisdiction so as to be able to "cede" it.

If sec. 10 (a) has any restrictive effect, it relates only to unfair practices, and not to questions of bargaining representatives.

IV.

The state board did not litigate any contract rights or obligations. In considering the date when an election could be most helpful, it correctly applied the state law so as to determine the date when a certain contract expired. Since the contract was made and to be performed in Wisconsin, the question had to be determined under state law.

The considerations with respect to the contract were only collateral issues and the certification by the state board did not purport to adjudicate upon the respective rights of the contracting parties.

## ARGUMENT

### I.

### THE ACTION OF THE STATE BOARD AND THE STATE COURTS IS NOT REVIEWABLE UNDER SECTION 237 (a) OF THE JUDICIAL CODE

Sec. 237 (a) of the Judicial Code authorizes appeal only from a "final judgment."

The test of whether a judgment is final within the meaning of the federal statute is not affected by the fact that it may be designated final by state courts or state statutes.

> *Gospel Army v. City of Los Angeles,* (1947) 331 U. S. 543, 546, 548, 67 S. Ct. 1428, 91 L. ed. 1662;
>
> *Richfield Oil Corp. v. State Board of Equalization,* (1946) 329 U. S. 69, 67 S. Ct. 156, 91 L. ed. 80.

Neither is state action reviewable under the federal statute merely because it is made appealable by state law. *Reddall v. Bryan, et al.,* (1860) 65 U. S. 420, 24 How. 420, 16 L. ed. 740.

In the *Gospel Army case, supra,* this court said:

> "Under sec. 237 of the Judicial Code, 28 U. S. C., sec. 344, only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' *Department of Banking v. Pink,* 317 U. S. 264, 267. Thus, where the

effect of the state court's direction is to grant a new trial, the judgment will not be final."

Similarly, the opinion in *Richfield Oil Corp. case*, supra, stated:

"I. We are met at the outset with the question whether the judgment of the California Supreme Court is a 'final judgment' within the meaning of the Judicial Code sec. 237, 28 U. S. C. sec. 344 (a). * * *

"The designation given the judgment by state practice is not controlling. *Department of Banking v. Pink*, 317 U. S. 264, 268. The question is whether it can be said that 'there is nothing more to be decided' (*Clark v. Williard*, 292 U. S. 112, 118), that there has been 'an effective determination of the litigation.' *Market Street Ry. Co. v. Railroad Commission*, 324 U. S. 548, 551; see *Radio Station WOW v. Johnson*, 326 U. S. 120, 123-24. That question will be resolved not only by an examination of the entire record (*Clark v. Williard, supra*) but where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice. * * *"

It has been regularly held by this court that a mere finding of fact or report which may be used as a basis for state action but is not enforcible *per se* is not a final judgment within the meaning of the appeal statutes.

See *United States v. Atlanta, B. & C. R. Co.*, (1931) 282 U. S. 522, 527-528, 75 L. ed. 1244, 51 S. Ct. 237 in which it was held that a finding and conclusion of the Interstate Commerce Commission was not such final action as to be reviewable. The court said:

"* * * The action here complained of is not in form an order. It is a part of a report—an opinion as dis-

tinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons. Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. * * * No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to jurisdictional review."

See, also, *Shannahan v. United States*, (1938) 303 U. S. 596, 599, 58 S. Ct. 732, 82 L. ed. 1039 where similar action was held not reviewable with the following comment:

"*First.* The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative.' * * * But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. 'It was merely preparation for possible action in some proceeding which may be instituted in the future.' * * *"

To the same effect is *United States v. Los Angeles & S. L. R. Co.*, (1927) 273 U. S. 299, 47 S. Ct. 413, 71 L. ed. 651.

This court has also held that administrative action in the nature of a report or finding which may adversely affect the party on the contingency of some further action in the future is not reviewable until and unless such further action is taken. See *Rochester Telephone Corporation v. United States*, (1939) 307 U. S. 125, 129, 130, 83 L. ed. 1147, 59 S. Ct. 754 in which such type of action was discussed:

"(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct

on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.

"* * *

"In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his right adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction, or rendering a tentative or final valuation under the Valuation Act, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act and therefore amenable to the National Mediation Board, are not reviewable."

It has been said that a judgment is not final so as to be reviewable within sec. 237 (a) of the Judicial Code unless an affirmance would end the litigation between the parties, and the court below would have nothing to do but execute its judgment. *Georgia Ry. & Power Co. v. Town of Decatur,* (1923) 262 U. S. 432, 43 S. Ct. 613, 67 L. ed. 1065. See, also, *Market St. Ry. Co. v. Railroad Commission,* (1945) 324 U. S. 548, 89 L. ed. 1171, 65 S. Ct. 770, rehearing denied 324 U. S. 890, 89 L. ed. 1438, 65 S. Ct. 1020.

The tests of finality have been specifically applied to the identical type of action which is here sought to be reviewed, and this court has held it not reviewable. In *American Federation of Labor v. National L. R. Board,* (1939)

308 U. S. 401, 84 L. ed. 347, 60 S. Ct. 300 a certification of a bargaining representative by the National Labor Relations Board was held not to be reviewable. The same result was reached in *Switchmen's Union of North America v. National M. Board,* (1943) 320 U. S. 297, 88 L. ed. 61, 64 S. Ct. 95 with respect to a certification of a bargaining agent, which was given considerably more legal effect by force of statute than the certification under review because as the court commented, the statute contained a mandate to the employer to "treat with the representative certified." The court said, however:

> "* * * The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate. *Virginian Ry. Co. v. System Federation, supra,* p. 562. The function of the Board under sec. 2, Ninth is more the function of a referee."

The action sought to be reviewed here is identical with that involved in the two foregoing cases. The state board issued no order. No judgment was entered in the state courts upon which execution could be issued. Nothing can be done by state courts or by any other state agency to enforce recognition or observance of the certification. It is nothing more than a report on the results of an investigation made known to the parties for such use as they desire to make of it.

The employer can not be required to bargain with the Guild, or with any other organization, until and unless an unfair practice charge is lodged against it and full hearing held upon due notice. Any order entered upon such hearing would be subject to judicial review, at which time any federal questions involved could be raised and litigated.

In that sense, it is analogous to the action involved in *Gospel Army v. City of Los Angeles, supra,* and the description in the first portion of the excerpt quoted from *Rochester Telephone Corporation v. United States, supra.*

An additional ground upon which review should be denied is the obvious fact that no one is aggrieved in a legal sense by a mere report of the results of an investigation. No one is subject to any jeopardy as the result of such a report. If being made aware of the true state of facts causes embarrassment to anyone, that surely has never been recognized as a legal grievance furnishing ground for judicial review. If anyone is the worse off for knowing the truth, it still would be inconsistent with precepts of freedom of speech to permit him to use the judicial process to suppress it. The courts will not strike down a state law on constitutional grounds at the behest of someone to whose injury it has not yet been applied.

As stated in *Alabama Federation of Labor v. McAdory,* (1945) 325 U. S. 450, 463, 65 S. Ct. 1384, 89 L. ed. 1725:

> "* * * Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding as in any other. * * *"

*Waters-Pierce Oil Co. v. Texas,* (1909) 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417;

*Voeller v. Neilston Warehouse Co.,* (1941) 311 U. S. 531, 61 S. Ct. 376, 85 L. ed. 322.

The chief authority, cited by the appellants to support their position that the case now before the court is reviewable as a final judgment, is *Allegheny Ludlum Steel Corp. v. Kelley, et al.* (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L.

ed. 4234. The appellants' resume of that case shows that the procedure there involved was in no way comparable. The decree there was entered upon a prayer for declaratory judgment and injunction, and the appeal was by the petitioner to whom the judgment was adverse. The action of the New York board in that case was something more than a finding of fact; it was a discretionary determination. We assume that the legal effect to be given to the act of a state agency is fixed by the law of the state involved. Whether action of a New York agency has the legal effect of a final judgment depends upon the law of that state. Whether the action of a Wisconsin agency (and that is all that is here involved because the action of the reviewing court in declining to set aside gives it no further efficacy than it had in the first instance) has the legal effect of a final judgment is to be determined by the law of Wisconsin. Wisconsin's Supreme Court has said that the conduct of an election "is mere fact-finding procedure * * * in the ascertainment of facts" (R. 55), and that the result of the election has no further efficacy than to reveal "the desire of solely the employees themselves." *United R. & W. D. S. E. of A. v. Wisconsin E. R. Board,* (1944) 245 Wis. 636, 641, 15 N. W. 2d 844.

It has been suggested that the state board waive its objection to jurisdiction in order that a decision on the merits can be obtained, which of course would be satisfactory to the appellant. A far simpler course for the appellants, however, if they were sincere in their desire for an authoritative determination as to a bargaining representative and were convinced that it could only be obtained from the national board, would have been to have petitioned the national board for an election.

It is our understanding, in any event, that if jurisdiction be lacking, it cannot be conferred by consent or waiver of parties. *Mills v. Brown,* (1842) 41 U. S. 525, 10 L. ed. 1055; *People of State of New York v. Zimmerman,* (1928) 278 U. S. 63, 49 S. Ct. 61, 73 L. ed. 184.

## II.

## THE CERTIFICATION OF FACT MADE BY THE STATE BOARD DOES NOT CONFLICT WITH ANY POLICY OF FEDERAL LEGISLATION NOR INFRINGE UPON A DOMAIN PRE-EMPTED BY CONGRESS

The employer is a Wisconsin corporation. Its employees all work within the boundaries of this state. Its primary function is to operate an important local telephone service. As a public utility it is subject to state regulation of rates and service. An interruption in that service would involve serious effects upon the welfare of local residents.

The state supreme court judicially noticed that the company renders in connection with its local service such intrastate and interstate long distance service as is "*incidental* thereto." There is nothing to show that the incidence of interstate toll calls is subsantial; that a substantial number, or even *any*, of the employees in the bargaining unit involved is engaged primarily in interstate service; or that the question of a bargaining representative in the unit is likely to lead to a labor dispute which might have a substantial effect upon commerce. A strike of national proportions might readily interrupt local service along with interstate service; but whether a dispute in a single local

exchange would have a substantial effect on interstate service is quite another question.

We raise these points *not* for the purpose of urging that the National Labor Relations Board could not, if it made the proper factual finding with respect to the effect upon interstate commerce, take jurisdiction; nor for the purpose of urging that Congress could not, if it chose, legislate with respect to the company's labor relations so as to pre-empt the subject matter entirely and preclude the state from *any* regulation. The nature of the company's operations is stressed because we believe it has a bearing upon the extent to which Congress intended to leave the power to act in the state. We believe the federal statute manifests the intent to leave to states the right to exercise their traditional police power with respect to intrastate enterprises affecting the welfare of their people, when the National Labor Relations Board can not, or does not, take over the problem; and that the law exercises a different degree of pre-emption with respect to matters falling within its purview when they are in commerce than when they merely *affect* commerce.

There is nothing in the record to indicate that the question of representation here arose *in* commerce. The alternative finding to invoke jurisdiction under the National Act would be that it "affects" commerce, which is defined to mean that it is likely to lead to a labor dispute which would obstruct commerce. The record does not establish that a stoppage of work in the La Crosse Telephone Company would have any serious effect on interstate toll traffic. There is nothing to indicate that the amount of interstate communication is greater than could be handled by

an office worker in her spare time, should toll operators go on strike.

There is no question, however, that a stoppage would seriously affect the *internal* welfare of the state. Surely, in such cases Congress intended that states should be entitled to take protective action when the national agency is either unable or unwilling to act.

This congressional intent, we believe, is revealed in the definition of the term "affecting commerce" contained in both the National Labor Relations Act and in its successor, the Labor-Management Relations Act, 1947:

> "The term 'affecting commerce' means in commerce, *or* burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U. S. C. A. Sec. 152 (7), 29 U. S. C. A. Supp. Sec. 152 (7).

The National Labor Relations Board is not given jurisdiction of *industries* as such, by the terms of the act, but only of questions of representation or unfair practices "affecting commerce." Under the foregoing definition, that means the questions or practices themselves must arise *in* commerce, or, if not, they must be shown as a fact to tend to obstruct commerce. This would seem to mean that, as to interstate commerce; Congress may have intended to assume plenary control which would automatically exclude states; but that as to matters arising in intrastate commerce it intended to assume control and thereby exclude states only in the specific cases where the necessary findings are made which are a necesary prerequisite to the application of federal law. Whether the effect of a particular contro-

versy is sufficient to warrant assumption of jurisdiction by the federal administrative board is left to be determined as a question of fact in each individual case when the business involved is essentially intrastate in character. Such a finding as related to the particular circumstances is a prerequisite to federal jurisdiction according to the rule of this court in *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 222-223, 83 L. ed. 126, 59 S. Ct. 206 where the court said:

> "* * * And whether or not particular action is the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. *Id.*, see, also *Santa Cruz Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, 467.
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> "* * *
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> "* * * But it is also true that where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority. The justification for the exercise of federal power should clearly appear. * * *"

It has been urged by the appellant company that Congress must have approved the ruling of *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767,

67 S. Ct. 1026, 91 L. ed. 1234, because no action was taken to the contrary. (With that contention we have no quarrel, since we are not under the necessity of urging that the decision should be overruled.) If that be true, it is surely likewise true that Congress is satisfied with the guides laid down in the *Consolidated Edison Case*, supra, because it has made no change in the provisions that the National Labor Relations Board is to take jurisdiction of only such questions of representation as affect commerce, of which the definition remains the same. That is, according to the foregoing case, if the question itself does not arise *in* commerce, the matter of its effect upon commerce is to be determined " as individual cases arise," and in such cases, the national board should have regard to "all existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority."

In neither the National Labor Relations Act nor in the Labor-Management Relations Act, 1947, did Congress make the applicability of the provisions relating to determinations of questions of representation dependent upon whether the *industry* affects commerce, but solely upon whether the particular *question* affects commerce. This distinction by Congress has been demonstrated to be intentional by the later enactment of the Labor-Management Relations Act, 1947. In the latter act, Congress made the applicability of some of the provisions dependent upon whether the *industry* affects commerce, as, for example, in Title III, Sections 301 and 302, 61 Stat. 156, 29 U. S. C. A. Supp. Sec. 185. It has, however, retained the same standards in Title I as were the basis for the discussion set out above from the *Consolidated Edison* case, that if the question itself does not arise *in* commerce, the board may take or re-

fuse jurisdiction in "individual cases" according to the circumstances "including the bearing and effect of any protective action to the same end already taken under state authority."

**In other words, Congress has reenacted without change the very provisions which formed the basis of this court's recognition of a power left to states with respect to questions of representation not actually arising in commerce.**

It is probably idle to contend in this era that there is any such thing as an industry which does not have some effect upon interstate commerce; and so if Congress should pass a law directly regulating labor relations in all *industries* affecting commerce there could be good ground for argument of preclusion of states from the field of labor relations altogether. With respect to enterprises essentially intrastate, however, Congress provided a standard by which the federal act should be applied only upon the basis of specific findings applicable to a single case.

Even though the circumstances are such as to furnish a basis for the proper jurisdictional findings by the national board, that still does not obligate it to take jurisdiction and to apply the act. As pointed out in *National L. R. Board v. Indiana & Michigan Elec. Co.*, (1943) 318 U. S. 9, 63 S. Ct. 394, 400, 87 L. ed. 579:

> "* * * It is not required by the statute to move on every charge; it is merely enabled to do so. * * *"

The discretion to decline to act is sometimes exercised on the basis that the extent of the effect of a particular dispute is not so great as to warrant the use of federal facilities. An illustration is the order issued by the National Board on July 30, 1948 in *Sta-Kleen Bak-*

*ery, Inc.*, 78 N. L. R. B. 94, 22 L. R. R. M. 1257 in which the National Board expressly found that 70% of the employers' supplies came to it from another state but nevertheless declined to exercise its jurisdiction. The national board recognized that circumstances there existed which would have warranted its assumption of jurisdiction, but nevertheless declined to take it in the belief that the extent of the effect was not sufficient to warrant the use of federal facilities. Surely Congress did not intend in such a case that the company and its employees must remain permanently in a No-Man's Land without either federal or state regulation, simply because its operations affected commerce so that it would be subject to the federal law if the national board had chosen to accept jurisdiction.

The fact that some interstate commerce is involved or affected is not sufficient to warrant the assumption that the federal act will necessarily be applied to a specific dispute. Title II of the National Act cannot be applied except through the agency of the national board.

Local B-953 refers at pages 20 to 22 of its brief to several decisions of the National Labor Relations Board in which it took jurisdiction over unfair labor practices or representation controversies in telephone operating companies. Such decisions do not establish that telephone operating companies are necessarily interstate enterprises, since the ground upon which jurisdiction was assumed in those cases is the *effect* of the practice upon interstate commerce.

In the cases cited by Local B-953 the question before the courts was whether there was substantial evidence in the record to support the findings of the national board, in which case the board's findings are conclusive. The

courts held that there was evidence to support the board's findings that the practices affected commerce, but there was no indication that the courts would not also have upheld a contrary finding to the effect that the circumstances shown did not involve a sufficient burden upon interstate commerce to warrant assumption of the jurisdiction of the national board, *particularly if the circumstances had included "protective action to the same end" taken under state authority as in the instant case.*

The facts in the cases cited by Local B-953 are not the same as those in the one at bar. In the case of *National Labor Rel. Board v. Central Missouri Telephone Co.*, (1940, 8th C. C. A.) 115 F. 2d 563, for example, the employer owned and operated 27 local agencies all connected with each other, and had a very substantial interstate revenue. It was also shown that the employer purchased large quantities of material outside the state. No such factual showing is here involved.

Even if we assume that sufficient facts could be affirmatively shown in this case to warrant a finding by the National Labor Relations Board that the question of representation affects commerce to such an extent as to warrant assumption of federal jurisdiction, that admission is by no means equivalent to saying that the industry is *per se* removed from the field of state regulation.

In the case now before the court it cannot be disputed, as was pointed out by the state supreme court, that "there is nothing in the record of the proceedings before the state board or in the circuit court to indicate that the National Board has ever in any manner exercised any of its powers or discretion or otherwise taken jurisdiction of any ques-

tion or phase of the employers or its employees industrial relations" (R. 53).

That is one of the important distinctions between this case and the case of *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234. In the case now before the court, if federal power *has* been delegated, it lies "dormant and unexercised."

It has been urged that under the *dicta* of the *Bethlehem case* the "case-by-case test" of jurisdiction under the national and state labor relations acts has been abolished. The *dicta* does not so indicate. The supreme court there recognized that "the national board has exercised power to certify bargaining agents for units of employees other than foremen of both companies" (loc. cit. 330 U. S. 770-771) and that its failure to entertain foremen's petitions was such as to take on "the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." (loc. cit. 330 U. S. 774.) The court said:

> "It [the National Board] made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. * * * *We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.*" (Emphasis supplied) (loc. cit. 330 U. S. 775).

On that premise the court said simply that it did not think that "a case-by-case test of federal supremacy is permissible *here*." (loc. cit. 330 U. S. 776) (Emphasis supplied). The court stated as a general proposition, however, that—

> "* * * when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulations of its subject * * * or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulations." (loc. cit. 330 U. S. 774)

Certainly the above words recognize not only that a case-by-case test is *permissible*, but that it is *necessary* as to segments of the regulation upon which the national board either has not been authorized, or has not exercised its authority, to lay down broad policies. There is no other way of carrying out the rules laid down by this court in the case of *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206 in which it was held, as to intrastate enterprises, that determination as to whether jurisdiction over a particular representation question or a particular unfair practice was "left to be determined as individual cases arise."

A second point of distinction between the case now before the court and the *Bethlehem case, supra*, is that the action here sought to be reviewed is merely a ministerial finding of fact, or report, *not* involving the exercise of discretion of the state board. This court has followed the rule that in evaluating the meaning and legal effect of state action the interpretation given by the state court of last resort is authoritative.

With respect to the action taken by the state board in merely ascertaining a fact which was, or should have been,

useful to the parties in voluntary adjustment of their collective bargaining problems, the state supreme court said:

> "The state board's action, which is under consideration on these appeals, does not involve the exercise of its discretion nor the formulation of any policy which does or could vary from those of the National Labor Relations Act. The mere fact-finding procedure of the state board in the ascertainment of the facts, and its thereupon ordering and conducting the election and certifying the result thereof, constitutes action in merely its ministerial capacity * * * and does not deny to the National Board or interfere with its right to exercise its discretion and powers if it should ever conclude to exercise its jurisdiction and powers in that respect to determine the appropriate bargaining representative or unit of representation."

With respect to the same kind of action the Wisconsin Supreme Court said in *United R. & W. D. S. E. of A. v. Wisconsin E. R. Board*, (1944) 245 Wis. 636, 641, 15 N. W. 2d 844:

> "* * * The board's order for the conduct of a referendum election, as likewise its conduct thereof, is merely fact-finding procedure; and in the conduct thereof to determine the wishes of employees respecting an all-union agreement, the board acts in merely a ministerial capacity. The result of the referendum represents the desire of solely the employees themselves; and the board functions as but a disinterested investigator or supervisor to ascertain that desire. * * *"

In the *Bethlehem Steel case, supra*, on the other hand, the question decided by the state board was one upon which both the federal and state acts had delegated to the

administrative authority "a wide discretion in applying this plan of regulation." The national board had exercised its discretion not only by laying down a broad policy on appropriate bargaining units, but by actually fixing units for the particular companies and employees involved.[1] In the instant case the appropriateness of the bargaining unit is not in question because all parties are in agreement upon it. Where the appropriateness of a unit is not questioned it is not necessary for the national board to take any action before collective bargaining may be conducted. The federal law imposes the obligation to bargain irrespective of whether the national board has acted to fix an appropriate unit. If the appropriateness of the unit is not questioned by any party, discretionary power in that respect does not enter the picture. By far the greatest number of employers and employees who are engaged in collective bargaining throughout the country have never been engaged in a proceeding before the national board to fix an appropriate unit. Such a proceeding is not a prerequisite to bargaining or to the choice of a representative.

In this case, the bargaining unit was fixed by agreement of all parties, including the employees themselves, and so the certification of the state board represents nothing but the expression of the wishes of employees, in a unit admitted to be appropriate, as to their bargaining representative.

Both the federal and the Wisconsin statutes seek to guarantee the right of workers to free choice in the selection of a bargaining agent, and to insure the continuance

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[1] Matter of Allegheny Ludlum Steel Corporation, case No. III-R-111, N. L. R. B. June 29, 1942. Matter of Bethlehem Steel Corp. & C.I.O., 30 N.L.R.B. 1006, 32 N.L.R.B. 264, (1941).

of free choice by enabling them to change their selection at any time when they feel that the chosen agent does not represent their interests as well as could another. The obligation of an employer to deal with whatever bargaining agent the employees desire exists under both the national and state acts *independent* of any certification made by either board. It is the fact of the employees' choice that determines who shall be the agent, rather than any action by either board.

It has been suggested that certain provisions of the Wisconsin statutes as written *might* have conflicted with the discretion which the national board enjoyed under the National Labor Relations Act, before it was amended by the Labor-Management Relations Act, 1947. It is expressly provided in Wisconsin's law that any provision which can not be validly applied in any case shall be disregarded in such case, and the law has been so interpreted.

**Wisconsin does not contend for "joint" jurisdiction as suggested in the brief of the appellant employer, but rather for a "subordinate" jurisdiction to act in intrastate enterprise where the national act has not been applied, in a manner not inconsistent with federal policy.**

The state supreme court has made clear that in any case where the National Board enters a controversy, state action is superseded. As it said in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1941) 237 Wis. 164, 179, 295 N. W. 791:

> "* * * To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities, both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substan-

tially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding."

We do not believe there is any irreconcilable difference in any of the provisions, but will not enlarge upon the point because, as this court pointed out in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 747-748, 62 S. Ct. 820, 86 L. ed. 1154:

"We are not under the necessity of treating the state Act as an inseparable whole. * * * Rather, we must read the state Act, for purposes of the present case, as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause. The Wisconsin Supreme Court seems to have been liberal in interpreting such clauses so as to separate valid from void provisions of statutes. Aside from that, Wisconsin in this case has in fact applied only a few of the many provisions of its Act to appellants. And we have the word of the Wisconsin Supreme Court that 'the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order.' * * * That construction is conclusive here. * * * Hence we need not speculate as to whether the portions of the statute on which the order rests are so intertwined with the others that the various provisions of the state Act must be considered as inseparable. Since Wisconsin has enforced an order based only on one part of the Act, we must consider that portion exactly as Wisconsin has treated it -'complete in itself and capable of standing alone.' * * *"

The mere ascertainment of a fact by the state board certainly does not frustrate any policies of the National Act, cause any forfeiture of bargaining rights, nor handicap the National Board in exercising its discretion. On the contrary, clarification of facts might be of assistance to the National Board if it should ever assume jurisdiction.[1] The state action involved in the case of *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234, on the other hand, could have frustrated a policy within the discretion of the National Labor Relations Board.

The National Labor Relations Board, which is necessarily limited by appropriations, would find it impossible to conduct elections in every case in which the law intends that an employer should bargain with the employees' representatives. It would make almost impossible the carrying out of the purpose of the national act if it were necessary for the national board to conduct an election in every case before an employer is obligated to bargain with his employees' representatives.

Under the National Labor Relations Act an employer was required to bargain with "representatives designated or selected by the majority of the employes for purposes of collective bargaining." (29 U. S. C. A. 1945, §159) (This language remains the same in the Labor-Management Relations Act, 1947, P. L. 101—80th Cong., ch. 120—1st Session, 29 U. S. C. A. Supp. sec. 159). The obligation does not await action by the national board. The *fact* of the employees'

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[1] Sec. 4 (a) of Title I of the Labor Management Relations Act, 1947, 61 Stat. 139, 29 U. S. C. A. Supp. sec. 154 (a) provides that

"The Board may * * * utilize such regional, local, or other agencies, and * * * such voluntary and uncompensated services, as may from time to time be needed."

choice may be determined by agreement, by a card check of union membership, or by any other method satisfactory to the employees without action by the national board. Certainly, if the objectives of the national act can be carried out by mere agreement between private parties, there can hardly be any conflict with the purposes of that act when the state agencies act to relieve the national board of the burden of ascertaining the identical facts upon which both laws operate.

The case of *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 has recognized that states may act "in the interval" before the federal agency establishes rules to make the federal law applicable, and on any question which may be considered a "distinct segment of the matter by the federal statute" when "the federal agency has not acted on that segment." (loc. cit. 330 U. S. 774) We believe the choice of a representative is a distinct segment of the federal regulation covered by the quoted words.

In this connection, we wish again to stress the fact that the supreme court of Wisconsin did not hold, as contended by the appellants, that the state board might conduct an election irrespective of whether the National Board had taken jurisdiction and irrespective of whether the action contravened any substantive provision of the National Act. As is obvious from a reading of the opinion of the supreme court of the State of Wisconsin, what it held was that the state board might assist the process of collective bargaining by using its facilities to ascertain facts, provided that the National Labor Relations Board *had not* taken jurisdiction of the same question, and provided that the state board *did not* exercise any discretion or act in any way which

might contravene a substantive policy of federal legislation.

The appellant, Local B-953, has cited two cases, *Linde Air Products Co. v. Johnson*, (1948) 77 Fed. Supp. 656 and *National Labor Relations Bd. v. Industrial Commission of Utah*, (1948) 15 Labor Cases, par. 64,626, in which certification proceedings by state boards were enjoined. We are glad to have those cases cited because they illustrate better than anything we can say the contrast between state legislation which seeks not only to frustrate policies of federal legislation but to supersede action of a federal agency in specific cases—and legislation like that of Wisconsin which not only provides that it shall, but is administered and interpreted to, supplement federal legislation in a subordinate capacity. In both of the above cited cases the National Board had not only taken jurisdiction (dismissing petitions because of failure of the petitioning union to comply with the non-communist provisions of the federal law) but had notified the state boards that their proposed actions were in substantive conflict with federal law. In the latter case, the National Board was concerned to the point of bringing the restraining action.

Wisconsin's board has followed federal policy, as it is authorized to do under the severability clause of its law as interpreted by the state supreme court, and has declined to extend the use of its facilities to organizations which fail to comply with the federal act. See *Crown Can Co.*, (1948) 22 LRRM 1369, 1370.

The Wisconsin board has operated in harmony with the federal board and hopes so to continue. The participation of the national board in the above cited cases, and its restraint from participation in the instant case, constitute

one of the fundamental distinctions between the two situations.

A situation in which there is a clash between a federal and a state agency, and in which the latter seeks to supersede the former and frustrate the policy of federal law, is in a totally different class from a case in which the challenge to state action is made by an individual and its effect, if successful, would be to frustrate the policy of both federal and state law.

## III.

## THE EFFECT OF THE ENACTMENT OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, AFTER THE STATE BOARD'S CERTIFICATION OF RESULTS OF THE ELECTION

The appellants have argued that differences in the terminology in parts of the Wisconsin Statutes, not here involved, and in certain parts of the National Labor Relations Act should be considered in order to invalidate the action of the state board. They have also laid great stress on sec. 10 (a) of the Labor-Management Relations Act, 1947, so that, while the state board's action was taken under one act, it must apparently meet challenges under both. To this we make no objection, although it would seem that certain matters must have become moot or academic by amendment of provisions which were advanced as a basis for argument on conflict (as in the discussion on pages 12 to 13 of the employer's brief). We have endeavored to explain under the last heading that there is no conflict in the provisions of the two laws involved in this case, and

that even as to the provisions not involved there is no conflict as they are administered and applied. Whatever differences there were between the National Labor Relations Act and the Wisconsin Employment Peace Act with respect to bargaining units and representatives have been substantially eradicated by the Labor-Management Relations Act, 1947 which decreased the area for exercise of discretion on such matters. Any differences in the policy of the two laws with respect to bargaining representative has been substantially minimized, if not eradicated. (See sec. 111.05, Wisconsin Statutes 1947, and sec. 9 Title I, Labor-Management Relations Act, 1947, 61 Stat. 143, 29 U. S. C. A. Supp. sec. 159).

Despite the greater uniformity of purpose and method between the present state and federal law on these questions the appellants argue that sec. 10 (a), 61 Stat. 146, 29 U. S. C. A. Supp. sec. 160 (a), (which is quoted on pages 16 to 17 of the brief of appellant, Local B-953, and pages 20 to 21 of the brief of the appellant employer), indicates that Congress intended under the earlier act to pre-empt the entire field of labor relations so as to leave no power in states to regulate at all. If this be true, it would mean that Congress intended by sec. 10 (a) to overrule this court's decision in *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206 which recognized some reserved power in states. If Congress had intended to overrule the guides laid down in that case, it would have altered its provisions which limit the jurisdiction of the national board to questions affecting commerce as previously defined. It made no change in those respects.

Instead, it provided for a ceding of jurisdiction in certain cases "even though such cases may involve labor disputes affecting commerce" which, under the definitions of

the act, mean disputes either arising *in* commerce or found as a fact by the board to tend to burden commerce, as in the *Consolidated Edison case, supra*. In other words, before the national board may "cede" jurisdiction it must first have taken jurisdiction by making the finding prerequisite to application of Title I of the Federal Act. In cases where it has taken jurisdiction it may then "cede" administration to states, where the industry is local in the sense that its operations are wholly within the boundaries of a state and not correlated with industries in other states, so that regulation in a single state may be effective. If the industry is not "local," in the sense that it may have manufacturing or assembly plants in several states so that bargaining units cross state lines and bargaining is done on an interstate basis, then the national board must handle its own administration.

We believe it is no accident that the term in sec. 10 (a) was changed from concede to cede. The term "cede" implies a turning over something which the federal agency has acquired and which could not be undertaken by a state agency without permission. The term concede more readily connotes an admission of a fact which would exist without the admission. We believe by the change in terminology Congress recognized two types of situation:

(1) Those in which the national board either automatically has jurisdiction (those arising *in* commerce) or has affirmatively taken jurisdiction (those found as a fact to *affect commerce*), in which it may "cede" jurisdiction;

(2) Those arising in intrastate commerce where there has been no affirmative finding that commerce is likely to be obstructed by the particular dispute, in which case there is no need for cession or concession because it has not been

taken out of the realm of reserved state power by the procedure prescribed by federal legislation.

The latter interpretation we deem would be essential to preserve the validity of sec. 10 (a). Surely, if Congress had completely extinguished state power in the first instance, it could not delegate to an administrative agency the power to recreate it by administrative fiat. There must be at least a scintilla of power left to the states by Congress, before there could be delegated to an administrative agency the authority to "cede" it in particular instances.

Congress has recognized a certain reserved power in states with respect to questions and practices arising in intrastate business which may be brought within the scope of the federal act by the necessary jurisdictional findings and then "ceded" for state administration in appropriate cases. That interpretation is borne out by the phrase "even though such cases may involve labor disputes affecting commerce" which indicates that its scope is limited to cases which have been brought within the scope of the federal law by observance of the jurisdictional prerequisites. The intent for a case-by-case cession is further borne out by the fact that the provision relating to consistency of state law does not apply to the law as a whole, but only to the "applicable provisions." What are the "applicable" provisions could not be determined except by evaluation of the specific case.

If there have as yet been no agreements under the authority of sec. 10 (a), it is primarily because its scope has not yet been clarified. Wisconsin has sought no agreement; but if any agreements are ever made under sec. 10 (a) there are no states which have laws more nearly consist-

ent, or whose objectives are more nearly identical with those of the federal legislation, than those of the state of Wisconsin.

Furthermore, as applied to this case, sec. 10 (a) would tend to establish that Congress did not *intend* to exclude states from conducting elections to reveal the desires of employees as to a bargaining representative, even if it were held that it does preclude states in the field of unfair practices.

The portion of that section quoted in the appellant's briefs follows upon the provision that the power of the national board shall be exclusive "to prevent any person from engaging in any unfair practice (listed in section 8)" 61 Stat. 146, 29 U. S. C. A. Supp. §160 (a). Whatever implication of preclusion there is in the section is expressly limited to prevention of the unfair practices enumerated. Under the well established principle of *"enumeratio unius est exclusio alterius,"* it would follow that if Congress provides that action should be precluded in one case, and fails to make such provision in another, such failure is indicative that it did not intend preclusion in the second case.

## IV.

## THE WISCONSIN EMPLOYMENT RELATIONS BOARD DID NOT DETERMINE ANY CONTRACT RIGHTS OF EMPLOYER AND EMPLOYEE

One of the specifications of error made by the appellant, La Crosse Telephone Company, is to the effect that the Wisconsin Employment Relations Board had no jurisdiction to determine contract rights of employer and employee where the employer is engaged in interstate commerce.

The question of interstate commerce has been heretofore covered, and this heading serves only to make the point that the Wisconsin board did not endeavor to litigate any contract rights or obligations as between the appellants or as between the appellants and other parties.

Its concern with the contract situation was solely in order to determine the best time for conducting an election to ascertain the wishes of the employees as to a collective bargaining representative for future negotiations, on the assumption that if a contract had been entered into which had a substantial term to run, the purposes of the employees might be better served by deferring the date of election.

The board's certification is not contended to have any efficacy to alter or even to affect any right or obligation under an existing contract. A certification made during an existing contract has the effect only to enable negotiations to be begun by the selected bargaining agent "a reasonable length of time prior to the expiration of the contract." The existence of a contract is not a bar to an elec-

tion under either state or federal procedure. Rather, the time which the contract has to run is to be considered only as it affects the probable date when negotiations for a new contract could and should be commenced.

In considering the question of previous collective bargaining contracts, the state board was concerned only in ascertaining facts for its guidance as to the best time for the conduct of an election to serve the interests of the parties. An election is not *invalid* by reason of being conducted during the existence of another contract, but only less serviceable from a practicable point of view if the contract has a substantial period to run. In determining how its factual investigation could best serve the parties, the board correctly applied the Wisconsin law with respect to the date of the acceptance of the 1946-7 contract between the employer and Local B-953, as is evidenced by the portion of the opinion of the Wisconsin Supreme Court appearing at pages 55 to 56 of the record.

The contract between the employer and Local B-953 was made in Wisconsin, for performance in Wisconsin, and regardless of whether the questions arise in a federal or state court, the questions relating to rights and obligations under the contract are determined according to the law of the forum in which it is made and performed. *Restatement of the Law of Conflict of Laws*, Sections 311, and 332.

## CONCLUSION

The limitations heretofore drawn by this court upon state jurisdiction, with respect to regulation of labor relations in intrastate enterprises, are to the effect that a state may not frustrate an objective sought to be obtained by Congress, and that it may not cause a forfeiture of bargaining rights (*Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 and *Hill v. State of Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782.

In making such limitations, we do not believe the court intended to emasculate the power of states to the end of permitting private individuals to accomplish the very things which state governments are forbidden to do. The objective of this suit, in which the employer and Local B-953 collaborate, is to defeat the wishes of employees in an admittedly appropriate unit who voted 91 to 14 in favor of the Guild as their bargaining representative. It is one of the objectives of federal legislation to insure to employees the right to bargain through representatives of their own choosing. In saying that states have no power to frustrate that objective, surely this court did not intend to place private individuals in a position superior to that of state governments. The purpose of defining the respective areas for operation of state and federal government is to enable them to operate in proper coordination toward the same objectives and thus to win the respect and obedience of the peoples governed. A striking down of the power of state governments would be anomalous if its sole effect

were to enable the subjects of the government to frustrate governmental objectives in a manner in which a governmental division itself can not do.

Respectfully submitted,

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## APPENDIX

The appendix to the brief of the appellant, Local B-953 quotes sec. 111.07 (10) of the Wisconsin Statutes with the apparent implication that it is applicable to the instant proceeding. It is not. It applies only to proceedings under sec. 111.07 (7) of the Wisconsin Statutes which provides in part:

> "If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. * * *"

Such a proceeding is not here involved. No provision is made by law for "stay" of a certification of the results of an election because there is nothing to stay. The certification is not enforcible.